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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. [redacted] 33

COMMONWEALTH OF PENNSYLVANIA ex rel. DOMINICK DAVERSE,

Petitioner,

vs.

WILLIAM HOHN, Warden of Westmoreland County Jail, and J. W. CLAUDY, Warden of Western State Penitentiary,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 701

COMMONWEALTH OF PENNSYLVANIA EX REL. DOMINICK DAVERSE,

Petitioner,

vs.

WILLIAM HOHN, WARDEN OF WESTMORELAND COUNTY JAIL, AND J. W. CLAUDY, WARDEN OF WESTERN STATE PENITENTIARY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Commonwealth of Pennsylvania on the relation of Dominick Daverse, by his attorneys, respectfully petitions the Court to grant a writ of certiorari to review the final order and decision of the Supreme Court of the State of Pennsylvania entered in the above-entitled matter on April 19, 1951 (R. 53).

Opinion Below

The opinion of the Supreme Court of Pennsylvania is not as yet reported, but appears in the record at R. 50.

Jurisdiction

The judgment sought to be reviewed is an original order made by the court below, which is the highest court of the State of Pennsylvania. It was made and entered April 19, 1951 (R. 53).

The jurisdiction of this Court is invoked pursuant to the provisions of § 1257 of the Judicial Code. The federal question, specially set up and claimed in the court below (R. 2-4, 12-13), relates to whether petitioner has been tried and convicted and sentenced to death in violation of his rights to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The same questions were involved in a petition for writ of habeas corpus presented to the United States District Court for the Western District of Pennsylvania, which court, sitting *en banc,* entered an order dated April 9, 1951, describing the said questions as "serious and vital", and directing petitioner to proceed forthwith with an application for writ of habeas corpus before the Supreme Court of Pennsylvania. The federal questions are, therefore, substantial. *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, 716.

Question Presented

Whether petitioner has been denied due process of law under the Fourteenth Amendment by reason of his trial for murder and the fixing of his punishment at death by a jury which included as a juror a peace officer who held a violent antipathy to Italians (petitioner being of Italian descent),

who has asserted his prejudging of petitioner, and with respect to whose statements there is some confirmation in respondent's own showing; and whether the state courts must accord some manner of a review of the allegations thus made.

Statement

Petitioner was indicted for the murder of his wife, and tried before a Pennsylvania state court at its May, 1947, term. The jury returned a verdict of "guilty of first degree; death", under the Pennsylvania practice whereby the jury fixes the penalty in murder cases; and petitioner was sentenced to death. R. 2. The Supreme Court of Pennsylvania affirmed the conviction and sentence in an opinion of March 30, 1951, 364 Pa. 623, 73 A. 2d 405. R. 2. No federal question was raised or determined by the court in connection with that review. *Id.*

Thereafter, a petition for a new trial supported by after-discovered evidence was presented to the Supreme Court of Pennsylvania, and denied. R. 2, 27. In the view that appeal does not lie from an order denying a new trial, no review of the order of the Supreme Court of Pennsylvania denying the petition for new trial was sought in this Court. The Supreme Court of Pennsylvania entered no opinion in connection with the petition for new trial.

On April 6, 1951, petitioner applied to the United States District Court for the Western District of Pennsylvania for a writ of habeas corpus, asserting his deprivation of due process of law under the Fourteenth Amendment to the Constitution of the United States in the course of the trial and conviction in the state court. Three days later, April 9, 1951, the United States District Court sitting *en banc* entered an order noting that petitioner had not previously petitioned for habeas corpus in the Supreme Court of Penn-

sylvania so that the state remedies had not been exhausted, (R. 3, 14, 44.)

> "* * * and that such procedure should be followed in view of the serious and vital questions which have been raised, which related to the statutes of the Commonwealth of Pennsylvania, and the Constitution of the Commonwealth of Pennsylvania, and the Constitution of the United States, it is ordered and directed that the petitioner proceed forthwith with an application for writ of habeas corpus before the Supreme Court of Pennsylvania which raises the questions about which complaint is now being made, more particularly the qualification of juror James P. Bridge to sit as a juror in judgment in the trial of said proceeding, and that the execution of judgment is suspended, pending the presentation of the petition for writ of habeas corpus to the Supreme Court of Pennsylvania". R. 14.

The petition for habeas corpus before the Supreme Court of Pennsylvania, the judgment of which is here sought to be reviewed, was filed promptly thereafter. An answer was filed to the petition, which was heard on petition and answer, as a result of which the petition was denied. R. 17, 50.

Petitioner is a citizen of the United States of Italian origin. R. 3, ¶ 11. On March 16, 1951, an investigator learned that one of the jurors who tried the issue of petitioner's guilt and the penalty to be inflicted upon him was violently prejudiced toward persons of Italian origin. An affidavit of the investigator (McGuire, R. 14-16) shows that this individual stated that "he knew from the start Daverse [petitioner] was guilty and that he had made his decision before the trial was over and it stands"; that "he knew Daverse before and he was no good." That "Daverse was a Communist and member of the Black Hand gang." He stated "Daverse is a killer like all Italians"; that while this juror was a peace officer during the past 28 years, he had been in

a bar-room fight with certain Italians, two of whom he had blackjacked to death and had seriously injured a third; and that "he had been involved in many fights with the 'no good sons-of-bitches' and that Daverse was just one of them". While respondent on March 19, 1951, took the affidavit of this juror in which he denies that he made the statements to the investigator, at the same time that affidavit admits the interview with the investigator and admits that he had told of his arrest of three Italians and use of a blackjack to make the arrest and that he had displayed some of the scars he received in the fracas. R. 37-41. He admits stating in the interview that in another altercation he had been shot in the leg, but stated upon his affidavit that it was a negro and not any Italian who shot him. (R. 39. In view of the boastfulness which the affidavit made by the juror himself discloses only three days after his interview with the investigator, it is scarcely credible that he did not also make the other statements sworn to by the investigator. But irrespective of the ultimate issue of fact between the two affiants, petitioner has received no hearing and has been unable to examine any witness or witnesses with respect to the charges, and so far as that feature of the case is concerned, the Supreme Court of Pennsylvania denies the petition for habeas corpus with no more than reference to the fact that the juror had denied the statements in an affidavit and that the state asserted that the juror's examination on his *voir dire* shows nothing misleading. R. 52.

Reasons for Granting the Writ

One of the jurors trying petitioner was violently anti-Italian. Petitioner is a citizen of the United States of Italian descent. The juror boasted to an investigator, according to the investigator's affidavit, of fights with Italians while attempting to arrest them, and of having blackjacked

two of them to death. The juror had prejudged the issue of petitioner's guilt—on this basis of petitioner's racial (or cultural, linguistic, or national) origin or background. As a result of petitioner's having his fate settled by a jury including such a bitterly prejudiced member, was petitioner deprived of a fair trial to the extent that his rights under the Fourteenth Amendment were infringed?

This Court has held, *Brown* v. *Mississippi*, 297 U.S. 278, 285-6, that the fact that a state may abolish trial by jury, or indictment, does not mean that the procedure it substitutes may be unfair, but that, whether through one agency or another, it must be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Here more, rather than less, was committed to the functions of the jury. And in that respect, the trier of fact and fixer of penalty was prejudiced more certainly than the prejudice merely implied, and held to offend the due process clause of the Fourteenth Amendment, in *Tumey* v. *Ohio*, 273 U.S. 510, 523.

Prejudice against petitioner by reason of his racial or national origin here affects the life of the accused, itself. Therefore, it is of more grave moment than many discriminations which this Court has struck down as violative of the Fourteenth Amendment, such as impairment of the right to vote in a state primary (*Smith* v. *Allwright*, 321 U.S. 649), evacuation of persons of Japanese ancestry from a war-sensitive location (*Ex parte Endo*, 323 U.S. 283, 303-4), systematic exclusion of persons of the accused's race from the grand jury which indicted, irrespective of whether actual prejudice is shown (*Hill* v. *Texas*, 316 U.S. 400), judicial enforcement of restrictive covenants in real-estate deeds, the restriction being based on race (*Hurd* v. *Hodge*, 334 U.S. 24, 31-34), racial restrictions on the ownership of agricultural land (*Oyama* v. *California*, 332 U.S. 633), or

the right to receive a legal education at a state-supported school theretofore maintained for the benefit of persons of other racial descent (*Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; *Sipuel* v. *Board of Regents Univ. Okla.*, 332 U.S. 631).

The mention below, R. 52, that the state alleges in its pleading that the juror had denied making the statements which prove prejudice and that nothing in the juror's *voir dire* had indicated anything misleading, disposes of no issue thus raised by the petition for habeas corpus. For petitioner has been accorded no hearing of his petition; he has had no opportunity to submit the issue thus made to a competent tribunal for determination. And assuredly the state must accord an opportunity to determine such issues, else its judgment be set aside in this Court. *Young* v. *Ragen, Warden*, 337 U.S. 235, 238.

Conclusion

The petition should be granted.

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